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No. 85-1596

In The
Supreme Court of the United States
October Term, 1985

STEIN DISTRIBUTING COMPANY, INC.,
Appellant,
v.
DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS,
Appellee.

AMICUS BRIEF IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES THOMAS JONES*
Attorney General
State of Idaho

PATRICK J. KOLE
Deputy Attorney General
Statehouse
Boise, Idaho 83720
(208) 334-2400

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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BRIEF OF THE ATTORNEY GENERAL FOR THE STATE OF IDAHO AS AMICUS CURIAE IN SUPPORT OF JURISDICTION

I

INTEREST OF THE AMICUS CURIAE

This brief is submitted by the Attorney General for the State of Idaho as *Amicus Curiae* in support of Appellant's Jurisdictional Statement. The decision being appealed from, *Stein Distributing Company v. Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms,* 779 F.2d 1407 (9th Cir. 1986), found an Idaho statute regulating the in-state distribution of wine, Idaho Code § 1325A, preempted by a Bureau of Alcohol, Tobacco & Firearms (BATF) regulation and enforcement decision.

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II

SUMMARY OF ARGUMENT

In contemplation of the Twenty-first Amendment, the State of Idaho has enacted a detailed body of law governing the distribution, sale and use of alcoholic beverages in the state. *See* Title 23, Idaho Code. One feature of that law is Idaho Code § 23-1325A which expressly permits a wine wholesaler to relocate and reset all wine upon the shelves of a retailer with the permission of and according to the space allocations chosen by the retailer. While the court below ostensibly held only that § 23-1325A was preempted by the BATF regulation, 27 C.F.R. § 6.99, it placed in constitutional jeopardy every provision of Idaho's liquor laws which regulate the private distribution and sale of alcoholic beverages.

In its decision, the Ninth Circuit ruled broadly that Idaho's interest in enacting § 1325A is necessarily less important than the federal interest in 27 C.F.R. § 6.99, which provides that an alcoholic beverage wholesaler may not "disturb" a competitor's products and that restocking an entire store is not "authorized". In doing so, the court below presumed the federal regulation to be paramount, even though the activity at issue took place entirely within the state and had at best an attenuated effect on interstate commerce. Moreover, it was not shown how any particular federal interest in the Federal Alcohol Administration Act (FAAA), 27 U.S.C. § 201 *et seq.*, was actually promoted by the regulation. If this BATF regulation can be interpreted to presumptively override a contrary state liquor law, the entire body of Idaho's alcoholic beverage law is threatened. This result is not countenanced by the Twenty-first Amendment or the intent of Congress in enacting the FAAA. A decision by this Court is necessary to restore the correct balance between state and federal power over the in-state sale and use of alcohol.

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III

ARGUMENT

A. State Regulation Over Alcoholic Beverages Pursuant to the 21st Amendment Is A Core Power Reserved to the States.

The Ninth Circuit decision is plainly contrary to the Twenty-first Amendment and the role it ascribes to the

states over the regulation of the sale and use of alcoholic beverages. As Justice Black observed some forty years ago: "Though the precise amount of power [the Twenty-first Amendment] has left Congress to regulate liquor under the Commerce Clause has not been marked out by decisions, this much is settled: Local, not national, regulation of liquor traffic is now the general constitutional policy". *Carter v. Virginia*, 321 U.S. 131, 138 (1944) (J. Black, concurring). As recently as 1984, this Court reached the same conclusion: "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system". *Capitol Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (quoting *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). Admittedly, state power over liquor is not unfettered and "the Amendment does not license the States to ignore their obligations under other provisions of the Constitution". *Id.* at 597. Nevertheless, any contention regarding the infirmity of state law in this area must overcome the "added presumption in favor of the validity of . . . state regulation" conferred by the Twenty-first Amendment over the in-state distribution and sale of liquor. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981) (quoting *California v. LaRue*, 409 U.S. 109, 118 (1972)).

Pursuant to the Twenty-first Amendment, the Idaho legislature has enacted a comprehensive body of statutes governing the distribution, sale and use of alcoholic beverages within the state's borders. As do other states, Idaho takes the subject of liquor control very seriously

and this interest certainly accounts in no small part for the detail in Idaho's liquor statutes.

In Idaho, the sale of alcoholic beverages is controlled by the State Liquor Dispensary. Pursuant to the powers granted to it, the State Liquor Dispensary has established state-controlled liquor stores. Except for beer and wine, all alcoholic beverages are sold through these stores, even liquor purchased by retailers for sale by the drink. Idaho Code §§ 23-201 - 207.

Although beer and wine may be imported into the state and sold to retailers by privately-owned enterprises, the distribution of these beverages remains heavily regulated. For example, before any person manufacturers, imports, distributes or sells beer or wine within the State of Idaho he must first receive a license from the Director of Law Enforcement. Idaho Code § 23-1003 (beer); Idaho Code § 23-1306 (wine). Among the multitude of regulations upon which such a license is conditioned, one finds prohibitions which are quite similar to the FAAA's tied-house provision and the regulations promulgated by the BATF. In Idaho Code § 23-1023 (beer) and Idaho Code § 23-1325 (wine), there is placed against beer and wine wholesalers a general prohibition against gaining a financial interest in or providing financial aid to retailers, with certain exceptions. Under the exceptions, a wholesaler may provide certain equipment, signs, supplies and services. For example, advertising signs and decorations may be provided to retailers, Idaho Code §§ 23-1033(b), 1325 (b), and the provision of tapping devices and related equipment, Idaho Code § 23-1033(a) (b), and newspaper cuts for advertising are also permitted. Idaho Code §§ 23-1033 (e), 1325(b). Wholesalers are also expressly allowed to

perform services incident to the stocking, rotation and restocking of beer and wine, including, with the permission of the retailer, setting and resetting all beer or wine upon the shelves of the retailer in accordance with space allocations directed by the retailer. Idaho Code §§ 23-1033(f) (beer), 1325A (wine).

In 1984, the Idaho legislature enacted §§ 1033(f) and 1325A in their present forms in response to the enforcement action brought by the BATF against the Appellant. The BATF had contended during the proceedings before the Administrative Law Judge (ALJ) that Idaho law did not permit Appellant to service beer and wine sections, including moving competitor's products with the permission of the retailer. The BATF was successful in convincing the ALJ that its interpretation of Idaho law was correct, despite testimony from the Chief of the Alcohol Beverage Control Bureau for the State of Idaho, among others, that Idaho law expressly condoned such conduct. App. 25a.

Fully aware of the enforcement proceeding brought by the BATF against Appellant and to ensure a federal interpretation consistent with the prior state regulatory interpretation and the original legislative intent, App. 20a, the Idaho legislature amended § 1033(f) and § 1325A in 1984. On appeal, the Director of the BATF found that at least since 1975 Idaho law expressly permitted the conduct and the 1984 amendments primarily served the purpose of clarifying existing law.[1] App. 25a-26a.

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[1] What is remarkable is that even though the BATF, as affirmed by the Ninth Circuit, ultimately found Appellant's con-

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Although Idaho Code § 23-1325A involves an attempt on the part of the State of Idaho to regulate an aspect of the in-state distribution and sale of wine, the Ninth Circuit rejected without analysis the Appellant's argument that § 1325A is an exercise of a "core power" under the second section of the Twenty-first Amendment. To do so it avoided this Court's statement that a direct attempt by a state "to regulate the sale or use of liquor within its borders" is "a core § 2 power". *Crisp*, 467 U.S. at 691. This feature of Idaho's alcoholic beverage regulations certainly falls within that definition, and it should therefore prevail over the contrary BATF rule and enforcement decision. *Id.; Midcal*, 445 U.S. at 110. If the words defining a core power do not mean what they appear to, this Court should so state, thereby enabling the State of Idaho and others to proceed accordingly when legislating in this area.

B. No Paramount Federal Interest Outweighs the State Interest in Regulating Alcoholic Beverages.

In addition to its failure to properly recognize that the Idaho statute involves the exercise of a core power under the Twenty-first Amendment, the court below had no legal basis to hold that the federal interest underly-

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duct expressly permitted by Idaho statutes with respect to both beer and wine distribution, it nevertheless concluded that the contrary BATF regulation preempted the Idaho statute governing these practices if a wholesaler is handling wine, but not beer. The subtleties of the FAAA and its "penultimate clause" aside, 27 U.S.C. § 205, this rationale leads to absurd results. A wholesaler servicing a beer section may touch a competitor's product, while he may not walk three feet and do so in the wine section.

ing the BATF regulation and enforcement decision necessarily outweighed that of the Idaho legislature in enacting § 23-1325A. 779 F.2d at 1411. Simply, instead of applying the rule that the Twenty-first Amendment creates an "added presumption" in favor of the validity of the state liquor regulation, *New York State Liquor Authority v. Bellanca,* 452 U.S. 714, 718 (1981), the court below presumed that federal law is dominant.

There are no cases which support either the Ninth Circuit's reasoning or its holding. On the contrary, in the first of two cases in which the Fifth Circuit addressed the same issues as presented by this appeal, the court noted:

> Thus, any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme.

Castlewood International Corp. v. Simon, 596 F.2d 638, 642 (5th Cir. 1979), *vacated and remanded,* 446 U.S. 949, *reinstated,* 626 F.2d 1200 (5th Cir. 1980). After further recognizing that "the Twenty-first Amendment 'demands wide latitude for regulation by the state' where liquor destined for use, distribution, or consumption is entirely within the state", *id.* at 643 (quoting *Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 42 (1966)), the Fifth Circuit held that a BATF ruling prohibiting price discounts, ATF-74, could not override a contrary Florida statute permitting such discounts. Fla. Stat. Ann. § 561.01(10).

In *Wine Industry of Florida, Inc. v. Miller,* 609 F.2d 1167 (5th Cir. 1980), the Fifth Circuit ruled that ATF 77-4, the predecessor of 27 C.F.R. § 6.99, had no effect on in-state distribution practices because of a Florida statute, Fla. Stat. Ann. § 561.424, which permitted extensive servicing by a distributor. Until the decision below was rendered the only law on point supported the conclusion that regulation of in-state alcohol distribution practices such as at issue here is primarily a local, not federal, concern.

The Ninth Circuit's presumption of the dominance of the federal interest is not only contrary to Twenty-first Amendment jurisprudence, it is contrary to the congressional intent underlying the FAAA. When the FAAA was enacted in 1935, it had been only two years since the adoption of the Twenty-first Amendment. Congress was well aware of its effect. Simply, Congress never intended for the FAAA to override state law and it certainly did not intend to permit the agency empowered to enforce the FAAA, now the BATF, to preempt state law. In the words of the Senate Report on the FAAA, S. Rep. No. 1215, 74th Cong. 1st Sess. at 7 (1935), the purpose of the Act is "to prevent the recurrence of these [tied-house and other] evils in the fields that cannot be reached by the States". Of course, this is a field which can be and has been reached by the State of Idaho. After years of experience with a law precluding the trade practices at issue, the Idaho legislature determined that resetting an entire beer or wine display by a wholesaler should be permitted. The legislature knew the same practices were performed by wholesalers of other products supplying supermarkets and grocery stores. No deleterious effects were cited and state as well as federal laws prohibiting

monopolization and other restraints of trade offer more than adequate protection if such activities were ever made the subject of an unfair trade practice complaint.

Certainly, the decision below does not serve Congress' intent that the FAAA "supplement" rather than overturn state law. Remarks of Rep. Cullen, Chairman of Ways and Means Subcommittee Reporting the House Bill, 76 Cong. Rec. 11714 (1935). Instead, under the Ninth Circuit's holding, the will of the BATF predominates, simply because it is an arm of the federal government. How this can be so in view of the Twenty-first Amendment and the intent underlying the FAAA is beyond comprehension. It is also impossible to understand how the interest of a federal agency charged in part with regulating interstate alcohol transactions necessarily outweighs that of a state charged with regulating intrastate alcohol transactions.[2]

C. The Decision Below Creates a Direct Conflict With State Law and Undermines Effective State Regulation of Alcoholic Beverages.

Under the Ninth Circuit's reasoning, if a state acts to create a system of prohibitory and permissive regulations governing the sale and use of liquor within its borders, it does so at its peril. Although the decision below was concerned only with a state regulation more permis-

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[2] See footnote 1. The State of Idaho also has a substantial interest in being able to regulate wine distribution practices in the same manner as beer distribution practices. In contrast, the federal interest served when the BATF can prohibit a wholesaler from resetting an entire wine section, but cannot preclude him from resetting an entire beer section in the same store can hardly be considered substantial.

sive than that of the BATF, there is nothing in its reasoning which indicates that a more restrictive state provision might not also fall under the presumed dominance of the alleged federal interests championed by the BATF. In addition, even if one assumes that the Ninth Circuit decision imperils only those state regulations which are more permissive than the BATF's regulations, one cannot isolate those provisions from an entire statutory scheme. In the context of alcoholic beverage regulation, the State of Idaho has permitted certain activity in view of what is prohibited and in view of commercial realities within the state. Therefore, if every state regulation which is slightly more permissive than the federal regulation necessarily falls, the entire state scheme is jeopardized.

The Ninth Circuit decision is also of great concern to this state because of its alternative holding: "The Twenty-first Amendment is not implicated because there is no conflict between the Idaho and federal laws". 779 F.2d at 1411. How and why the Ninth Circuit could make such a statement after finding the Idaho statute preempted by the contrary BATF regulation and enforcement decision is unclear. What is clear is that there is no law which supports such a holding and, in fact, the only cases on point reached a contrary conclusion. *Castlewood*, 596 F.2d 638; *Wine Industry*, 609 F.2d 1167. Once again, the conflict between the circuits should be resolved by this Court.

Despite the fact that the Idaho statute in question expressly permits the conduct at issue, the court below held that since such conduct is not mandated, there is no conflict between it and the federal prohibition. In support of this rationale, the Ninth Circuit relied on this Court's

cases which establish the test for determining whether an act of Congress will be found to have preempted state law under the Supremacy Clause. *E.g. Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). What this Court has established pursuant to those cases is that one must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress". *Id.* at 526 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see Hillsboro County Florida v. Automated Medical Laboratory, Inc.*, — U.S. —, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). Therefore, to avoid striking down state laws, the "teaching of this court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists". *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. at 45 (quoting *Huron Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960)). Using this analysis, the court below thought it could avoid the Twenty-first Amendment issue.

The disastrous effect of the Ninth Circuit's topsy-turvy preemption analysis is not difficult to comprehend. While the intended result of avoiding unnecessary conflicts is to sustain the state law, the effect here of finding no conflict is to make the state law a nullity. Since the state law is permissive, it can be followed only at the risk of the BATF's sanction. The potential for undermining other state regulations concerning alcohol is also easy to foresee. If, contrary to state law, Congress determines that saloons should be closed on Sundays and persons under twenty-one years of age should not be permitted to drink, it may do so without concern whether the Twenty-first Amendment precludes such legislation.

Simply, the constitutional question would not be reached if the state had not "mandated" Sunday sales and drinking at the age of nineteen.

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IV

CONCLUSION

Contrary to the prior decisions of this Court and the decisions of the Fifth Circuit, the court below ruled that national, not local, regulation of in-state liquor traffic is now the general constitutional policy. *Cf. Carter*, 321 U.S. at 138 (J. Black, concurring). Doing so, the court below held that an Idaho statute was preempted, if not merely a nullity, by virtue of a contrary BATF regulation. This Court is requested to accept jurisdiction over this appeal to consider the important questions it raises and to resolve the conflict between the Fifth and Ninth Circuits.

Respectfully submitted,

JAMES THOMAS JONES*
Attorney General
State of Idaho

PATRICK J. KOLE
Deputy Attorney General
Statehouse
Boise, Idaho 83720
(208) 334-2400

* Counsel of Record